SUPREME COURT, U. S.
(3093)

APR 1 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 660
October Term, 1967

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACK, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK,

Appellants,

v.

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Appellee,

and

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,

Intervenor-Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR APPELLEE, JAMES E. ALLEN, JR.

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Appellee,
James E. Allen, Jr.
The Capitol
Albany, New York 12224

RUTH KESSLER TOCH
Solicitor General

JEAN M. COON
Assistant Attorney General

of Counsel

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

TABLE OF CONTENTS.

	PAGE
Statement of the Case	1
Questions Presented for Review	5
Summary of Argument	5
Argument	7
POINT I. The provision of textbooks to all children, enrolled in grades 7 through 12, without regard to the nature of the school attended, does not constitute an establishment of or aid to religion, but rather an aid and benefit to the child receiving the textbooks	7
A. Nonpreferential provision of textbooks to children in both secular and sectarian schools does not constitute an establishment of religion in the historical context of the First Amendment	10
B. Nonpreferential aid to students does not constitute an establishment of religion as defined by the decisions of this Court, but rather constitutes aid to the child alone	15
POINT II. The provision of textbooks to all children enrolled in specified school grades constitutes a public welfare program of the State and providing access to that program to all children regardless of their religious faith, or lack of it, does not constitute an establishment of religion	22
POINT III. Expenditure of general tax money for textbooks to be provided to all children regardless of the school they attend does not violate the "Free Exercise" Clause of the First Amendment solely because some children receiving the books attend sectarian schools	36
Conclusion	41

IN THE

Supreme Court of the United States

No. 660
October Term, 1967

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACK, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK,

Appellants,

v.

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Appellee,

and

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,

Intervenor-Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE NEW YORK.

BRIEF FOR APPELLEE, JAMES E. ALLEN, JR.

Statement of the Case

Prior to amendment in 1965, New York Education Law, § 701, mandated that boards of education of school districts in the State designate textbooks to be used in schools under their control and further gave those districts the option to

purchase textbooks and supplies and either *rent or sell* them to students attending public schools in the districts. Section 703 of the Education Law also authorized the voters of a school district to authorize the provision of free textbooks to all pupils attending schools in the district. While the section did not limit the provision of textbooks to pupils attending public schools, as did § 701, as a matter of fact free textbooks were provided, by those districts which voted to do so, only to pupils in public schools.

In 1965, § 701 was amended to provide that, insofar as pupils enrolled in grades 7 through 12 of public or private schools were concerned, the districts would thereafter have the power and duty to purchase and loan, upon individual student request, textbooks for use in such schools. Textbooks to be loaned to children attending private schools are required to be books designated for use in public elementary or secondary schools in the State, or approved by a public school board. The option to provide free textbooks, formerly provided in § 703, was limited by amendment of that section to pupils enrolled in grades 1 through 6 in schools of the district. The combined effect of those amendments was to mandate the provision of free textbooks to pupils in grades 7 through 12 of both public and nonpublic schools.

Since the 1965 statute provided no dollar limits in the amounts required to be spent by the districts, although it limited State reimbursement to $10 per pupil, the statute was amended in 1966 to provide for one hundred percent reimbursement for expenditures up to $15 per pupil in the 1966, 1967, and 1968 school years and $10 per pupil thereafter, and to limit the *required* district expenditures to those amounts. The amendment also provided that expenditures in excess of those amounts would be reimbursed

as normal district operating expense, based upon a formula resulting in something less than full reimbursement.

In enacting Chapter 320 of the Laws of 1965, the New York State Legislature included in the enactment a statement of the legislative policy which prompted the adoption of the statute. That policy statement provides:

> "The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other non-sectarian subjects. The Congress of the United States has reaffirmed the principle that the states and local communities retain primary responsibility for public education. It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state."

While one of the primary issues in this case in the State Courts was the issue of appellants' standing, as a political subdivision of the State, to question the constitutionality of an act of the State legislature, all of the Courts which reviewed the question either ruled on the merits of constitutionality or expressed their views in *dicta*. Supreme Court, Albany County, held the statute to be unconstitutional under both the State Constitution and the First Amendment of the United States Constitution. The Appellate Division, reversing on standing to sue, also stated, both in the majority and concurring opinions, that in its view the statute was constitutional (A 45-46, 55-56, 60).

ing financial burdens has been provided to sectarian schools. The only beneficiaries of this law are students and their parents. On that basis the law cannot be said to be an establishment of religion.

What is prohibited by the establishment clause is aid directed to the aid of religion. Public welfare programs which have as their purpose the advancement of educational opportunity and of the quality of education availavailable to all children, regardless of their religious faith, are not directed to the aid of religion; they do not have as their objective the aid of any or all religions, but only aid to education and to the children receiving that education, and, therefore, do not constitute an establishment of religion.

New York's textbook loan law, having as its purpose and primary effect the advancement of educational opportunity and standards for all children in the State, has a secular legislative purpose and secular effect and therefor does not constitute an establishment of religion in violation of the prohibitions of the First Amendment.

Use of tax money to provide secular textbooks to all children in no way impedes any person in the free exercise of his own religion. It has no effect whatsoever upon the exercise of anyone's religion. However, where govenment engages in major public welfare programs in aid of education the denial of any part of that aid to children attending sectarian schools creates and expands a disadvantage in educational opportunity to those children and may by virtue of that effect make it virtually impossible, as a practical matter, for parents to send their children to sectarian schools and thereby deprive those parents and their children of the free exercise of their religion to

the extent that the free exercise clause guaranties them the right to send those children to sectarian schools.

ARGUMENT

POINT I

The provision of textbooks to all children, enrolled in grades 7 through 12, without regard to the nature of the school attended, does not constitute an establishment of or aid to religion, but rather an aid and benefit to the child receiving the textbooks.

Prior to the 1965 amendment, the New York Education Law authorized local school boards to designate textbooks to be used in public schools of such districts. It also authorizes the school districts to purchase textbooks and supplies and either rent or sell them to public school pupils. Section 703 of the New York Education Law also authorized the voters of a school district to elect to provide free textbooks to pupils in schools in the district.

The record in this case does not indicate how many districts in New York State had elected to provide free textbooks prior to the 1965 amendment. However, contrary to the allegations in the briefs of appellants and the *amici* supporting their position, at least 12 school districts in the State did not provide free textbooks, some of them districts in the cities where the problems of the educationally disadvantaged are greatest.[1] Nor does the record indicate

[1] These were Binghamton (pop. 75,941), Syracuse (pop, 216,083), Troy (pop. 67,492), Johnson City (pop. 19,118), Plattsburgh (pop. 20,172), East Aurora (central school district, no population figures available), Elmira (pop. 46,517—English texts in grades 10-12 were provided), Geneva (pop. 17,286), LeRoy (central school district—no population figures available), Rome (pop. 51,646—texts were supplied in grades below 10th), Utica (pop. 100,410—rented texts to grades 10-12 only), Schenectady (pop. 81,682).

to what extent districts providing free textbooks maintained a sufficient level of expenditure to provide up-to-date textbooks. It may also be inferred from the fact of the 1966 amendment limiting the districts' expenditure obligation, that the districts did not, in fact, provide all textbooks for all pupils in grades 7 through 12 prior to the 1965 enactment.

The record also does not state that any sectarian schools provided textbooks for their pupils. The only allegation in this regard in the record is the uncontradicted assertion by the intervenors that they, the parents, purchased the textbooks used by their children attending sectarian schools. Further support for the contention that nonpublic schools *do not* provide textbooks, is found in the statement of Francis Keppel, Commissioner of Education of the Department of Health, Education and Welfare, submitted to the General Subcommittee on Education and Labor of the United States House of Representatives on January 22, 1965, in which he stated that "Nonpublic schools *rarely* provide free textbooks". (Hearing before House Subcommittee on Education and Labor on Elementary and Secondary Education Act of 1965, Vol. I, p. 93).

The next question to be considered in order to place New York's statute in perspective is what exactly did the statute change? Insofar as grades 7 through 12 (junior and senior high school) were concerned, it changed a permissive statute, which allowed school districts to rent or sell books to pupils or, only after approval by the voters of the districts, to provide free textbooks, to a mandatory one requiring the districts to purchase and loan textbooks to all children, residing in the district and enrolled in grades 7 through 12 of public or private schools. It guaranteed that children in those grades would receive

textbooks at no cost, whereas before in many school districts the children would have had to purchase or rent them from the district.

Possibly most important is what the statute did not do. It was not surplusage as far as public school districts were concerned. Prior to the 1965 enactment, all public school districts in the State of New York did not provide all textbooks free to all pupils enrolled in grades 7 through 12 of the public schools. Many of the districts which did not provide books were city school districts where the problems of the educationally disadvantaged are greatest. As to the sectarian schools, there is no indication that they provided any textboooks for their pupils and the statute does not provide texts to the schools. On the particular facts of this case it is clear that, in fact, the parents provided their children's books and that if any group was assisted by this statute it has been the children and their parents and not the schools.

However, the appellant school boards have challenged the constitutionality of New York Education Law, § 701, on the ground that it violates the First Amendment of the United States Constitution. That Amendment, as made applicable to the states by the Fourteenth Amendment,[2] prohibits laws respecting the establishment of religion or prohibiting the free exercise thereof.

It is submitted by appellee herein that the provision of free textbooks equally to all children in the State, regardless of their religion or the nature of the school they attend, is not an establishment of religion in either the historical context of the First Amendment or within the

[2] See Cantwell v. Connecticut, 310 U. S. 296 (1940).

framework of the judicial interpretation of that Amendment.[3]

A. Nonpreferential provision of textbooks to children in both secular and sectarian schools does not constitute an establishment of religion in the historical context of the First Amendment.

While, of course, the extent of the First Amendment's application to present-day statutes is not limited to the concepts of the drafters of the Amendment, the meaning which they ascribed to it has been considered in depth by this Court in applying it to current situations (see, *e.g., Everson* v. *Board of Education,* 330 U. S. 1 [1947]; *Abington School District* v. *Schempp,* 374 U. S. 203 [1963]).

When the early settlers came to this country from Europe, they brought with them, not only political and social customs, but also many of the religious problems which were indigenous to their countries of origin. In Europe there were religions established and supported by government, a factor which engendered many of the emigrations which founded the United States. Persecution in the name of religion drove the colonists from Europe to America. But those same practices were transplanted to the New World and at the time of the adoption of the Constitution and the Bill of Rights there were established churches in a majority of the original Thirteen Colonies and almost every colony exacted some kind of tax for church support. In the language of the opinion of this Court in the *Everson* case, *supra* (p. 11):

> "These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers'

[3] The relation of the statute to the Free Exercise Clause will be discussed in Point III *infra.*

> salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment."

Consequently, the original and prime intent of the First Amendment was to prohibit the direct establishment of a national church and to further prohibit the direct support of any one religion or of all religions.

But what of statutes and government actions other than direct establishment? While not a member of the Congress which adopted the Bill of Rights, Thomas Jefferson is considered as a spokesman for the anti-establishment movement. It was he who first used the phrase "a wall of separation between church and state" in his letter to the Danbury Baptists in reply to their address of congratulation and good wishes upon his becoming President of the United States. That Jefferson did not consider this "wall" to bar all relations between government and religion is clear from both his actions and subsequent writings. Thomas Jefferson was President of the United States for 8 years, during which time Federal funds were used to aid religion in various ways without protest from the President. Federal funds were used to support missionaries to Christianize and civilize the Indians. The chaplain service for the Army and Navy had been established long before Jefferson became president and was continued under Jefferson. Probably Jefferson's most specific statement in regard to the relation of government to religion is found in a statement made in 1822, after he had left the presidency, concerning freedom of religion at the University of Virginia, of which he was one of the founders. In his report as Rector, Mr. Jefferson stated:[4]

---

[4] 19 The Writings of Thomas Jefferson (Memorial Edition, 1904) 414 *et seq.*, quoted in *McCollum* v. *Board of Education*, 333 U. S. 203, 245-246 (1948).

> "The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in a general institution of the useful sciences. * * * A remedy, however, has been suggested of promising aspect, which, while it excludes the public authorities from the domain of religious freedom, will give to the sectarian schools of divinity the full benefit of the public provisions made for instruction in the other branches of science. * * * It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, to establish their religious schools on the confines of the University, so as to give their students ready and convenient access and attendance on the scientific lectures of the University * * *. Such establishments would offer the further and greater advantage of enabling the students of the University to attend religious exercises with the professor of their particular sect, either in the rooms of the building still to be erected * * * or in the lecturing room of such professor."

Jefferson, therefore, saw no breach in the "wall of separation" resulting from nonpreferential aid to sectarian students.

Next to Jefferson, Madison ranks as probably the most significant spokesman on the meaning of the First Amendment. Possibly he should even be given foremost status since he was primarily responsible for the language of the Amendment. On June 8, 1789, Madison in the First Congress stated that his understanding of the meaning of the Amendment was that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[5] In his *Detached Memoranda,* written some time after 1817, Madison wrote that the people of the United States "have the noble merit of first unshackling the

[5] 1 Annals of Congress 729-731 (Benton ed. 1858).

conscience from persecuting laws and of establishing among religious sects a legal equality."

Madison also was President of the United States for 8 years, during which time Federal funds supported military chaplaincies and missionaries to the Indians without criticism from the President.

Surely we can find no support in the writings and opinions of the formulators of and spokesmen for the First Amendment for the argument that public aid to children regardless of their religion constitutes an establishment of religion. Nor can any support be found for that proposition in the total record of the Presidents or the Congress.

As previously stated, Federal funds for missionaries to the Indians were first paid under Washington and continued until 1900 when changed conditions on the reservations, not constitutional problems, resulted in a change in the system. The First and Third Congresses, also under Washington, created the military chaplaincies for which Federal funds are still being paid. Under every Congress there have been chaplains in the House and Senate and in Federal institutions, such as hospitals and correctional institutions, and religious services are held at the United States military academies. Sectarian property and income is tax exempt; clergymen and divinity students have been made exempt from the draft, as are conscientious objectors; the Bible is used for administering of oaths; NYA and WPA funds were available to both public and sectarian schools during the depression period; religious organizations are given special postal privileges; and hospitals owned by religious organizations are eligible for aid under the Hill-Burton Hospital Construction Act.[6]

[6] Hill-Burton Act of 1946, 60 Stat. 1040, 42 U. S. C. §§ 29-92.

Many other Federal statutes have provided nondiscriminatory aid to students attending public and nonpublic schools, both directly and through the institutions they attend. Among these are the National School Lunch Act,[7] free milk under the Agriculture Act of 1949,[8] the National Defense Education Act of 1958,[9] College Housing Act of 1950,[10] the Higher Education Facilities Act,[11] the Higher Education Act,[12] the Elementary and Secondary Education Act,[13] the Surplus Property Act of 1944 which, as of 1961, had resulted in 488 grants of land and buildings to church-related schools of 35 denominations,[14] and the G.I. Bill of Rights.[15]

From this listing we must assume that either the Congress and the Presidents have been totally wrong under the Constitution or that the First Amendment prohibition of an establishment of religion does not bar nonpreferential aid to individuals solely because they attend sectarian institutions. It is submitted that this latter position is the real meaning of the "child benefit" theory (*Infra* "B").

---

[7] 60 Stat. 230 (1946), 42 U. S. C. § 1751.

[8] 63 Stat. 1051 (1949), 7 U. S. C. § 1431.

[9] 72 Stat. 1580 (1958), 20 U. S. C. §§ 401-589.

[10] 12 U. S. C. §§ 1749-1749c.

[11] 77 Stat. 363 (1963), 20 U. S. C. §§ 701-757.

[12] 79 Stat. 1219 (1965), 20 U. S. C. §§ 1001-1144.

[13] 79 Stat. 27 (1965), 20 U. S. C. §§ 236-244, 331-332.

[14] 58 Stat. 765 (1944), 40 U. S. C. §§ 484(j) and 484(k); 107 Cong. Rec. 17351.

[15] 66 Stat. 663 (1952), 38 U. S. C. § 911.

B. Nonpreferential aid to students in both public and sectarian schools does not constitute an establishment of religion as defined by the decisions of this Court, but rather constitutes aid to the child alone.

Probably the earliest case to adopt the "child benefit" theory was *Cochran* v. *Board of Education* (281 U. S. 370 [1930]), which, while decided under the Fourteenth Amendment rather than the First, involved the provision of textbooks, by the State of Louisiana, to pupils in both public and sectarian schools. Holding that the expenditure of money for that purpose was not the taking of private property for a public purpose, this Court stated (pp. 374-375):

> "The purpose is said to be to aid private, religious, sectarian, and other schools not embraced in the public educational system of the State by furnishing textbooks free to the children attending such private schools. The operation and effect of the legislation in question were described by the Supreme Court of the State as follows (168 La., p. 1020):
>
> "'One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. *The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries.* It is also true that the sectarian schools, which some of the children attend, instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without result, in

> an effort to find anything to the effect that it is the purpose of the state to furnish religious books for the use of such children * * *. What the statutes contemplate is that the same books that are furnished children attending public schools shall be furnished children attending private schools. This is the only practical way of interpreting and executing the statutes, and this is what the state board of education is doing. Among these books, naturally, none is to be expected, adapted to religious instruction.' " (Emphasis added.)

Of significance to a discussion of the meaning of the establishment clause in this regard are the concluding statements of the opinion (p. 375):

> "The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive."

Probably the most often quoted case, on both sides of the establishment argument, is the *Everson* case.[16] In that case this Court held that the nonpreferential provision of school bus transportation for children attending both public and nonpublic schools constituted an aid to the children, not to their respective schools, and did not constitute an establishment of religion. In so holding, this Court, in an opinion by Mr. Justice BLACK, expressed clearly the meaning of the "child benefit theory" and its compatibility with the First Amendment. Certain statements in the opinion, such as the following, are significant in placing the case in appropriate First Amendment context:

> "* * * the New Jersey legislature has decided that a public purpose will be served by using tax-raised funds to pay the bus fares of all school children, in-

[16] *Everson* v. *Board of Education*, 330 U. S. 1 (1947).

cluding those who attend parochial schools. The New Jersey Court of Appeals has reached the same conclusion. The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need." (330 U. S., p. 6.)

"It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose . . . . The same thing is no less true of legislation to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or 'hitchhiking'." (330 U. S., p. 7.)

"The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." (330 U. S., p. 18.)

The common factor in both the *Everson* and *Cochran* cases is that the program involved was a general nonpreferential program directed to aid all children regardless of their religious faith and not because of it. That this is significant, insofar as the validity of such programs under the Establishment Clause is concerned, is clear from the much quoted exposition of the meaning of that Clause by Mr. Justice BLACK in the *Everson* opinion (330 U. S., pp. 15-16):

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from

> church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' "

The common denominator in all the activities there stated to be prohibited is that the law, activity, or tax must be directed to the aid of religion as such. That opinion did not declare to be prohibited general public programs not intended or directed to the aid of religion which, by the fact that they incidentally aid adherents to a particular religion or to all religions, also incidentally or collaterally aid the religion.

Even more recently than *Everson,* a decision of this Court has clearly held that laws are not rendered invalid solely because there may be some indirect or collateral aid to proponents of a religious belief. In the Sunday-closing cases, this Court upheld the validity of laws making Sunday a universal day of rest in the face of the admittedly religious origin of those laws and the fact that their current enforcement incidentally aids certain religious denominations in the profession of their beliefs. In so holding, this Court interpreted the Establishment Clause "in the light of its history and the evils it was designed forever to suppress" (*McGowan* v. *Maryland,* 366 U. S. 420, 442 [1961]). The opinion further states (366 U. S. p. 442):

> "* * * the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."

Furthermore, as this Court said in *Everson* (330 U. S., *supra*, p. 18):

> "That [First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

Mr. Justice FRANKFURTER, concurring in *McGowan*, stated the purpose of the Establishment Clause to be simply to assure that religion, as religion, would not be made the object of legislation (366 U. S., p. 465). In this regard, he stated, the object of the legislation must be determined (366 U. S., pp. 466-467):

> "To ask what interest, what objective, legislation serves, of course, is not to psychoanalyze its legislators, but to examine the necessary effects of what they have enacted. If the primary end achieved by a form of regulation is the affirmation or promotion of religious doctrine-primary, in the sense that all secular ends which it purportedly serves are derivative from, not wholly independent of, the advancement of religion—the regulation is beyond the power of the state. This was the case in *McCollum*. Or if a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone—where the same secular ends could equally be attained by means which do not have consequences for promotion of religion—the statute cannot stand. A State may not endow a church although that church might inculcate in its parishioners moral concepts deemed to make them better citizens, because the very *raison d'être* of a church, as opposed to any other school of civilly serviceable morals, is the predication of re-

ligious doctrine. However, inasmuch as individuals are free, if they will, to build their own churches and worship in them, the State may guard its people's safety by extending fire and police protection to the churches so built. It was on the reasoning that parents are also at liberty to send their children to parochial schools which meet the reasonable educational standards of the State, *Pierce* v. *Society of Sisters*, 268 U. S. 510, that this Court held in the *Everson* case that expenditure of public funds to assure that children attending every kind of school enjoy the relative security of buses, rather than being left to walk or hitchhike, is not an unconstitutional 'establishment,' even though such an expenditure may cause some children to go to parochial schools who would not otherwise have gone."

Applying these decisions to the instant case, we observe the following factors. The intent of the statute was set forth in the statement of legislative policy in Chapter 320, New York Laws of 1965:

> "The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other non-sectarian subjects. The Congress of the United States has reaffirmed the principle that the states and local communities retain primary responsibility for public education. It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense, and the general welfare of the state."

It demonstrates a secular policy of providing better educational opportunity to all children through the provision

of free textbooks. Recognizing that parents have a constitutional right to send their children to sectarian schools, the Legislature could not fully attain the expressed secular end without including the large percentage of the total school population enrolled in sectarian schools (See Point II, *infra*). The aid is given directly to the students; it relieves the sectarian institution of no financial burden previously assumed. If, as an incidental effect, the provision of free textbooks makes it easier for parents to send their children to sectarian schools, that no more constitutes the establishment of a religion than does the provision of bus transportation or fire and police protection.

In summary, it must be observed as to the operation of the New York statute that no religious institution acquires property or funds through the State action, the textbooks belong to the public school districts and are loaned to pupils; the State, through the public school districts, retains complete control over the administration and expenditure of all public funds; and no religious texts or sectarian editions of the textbooks may be provided, so that no religious use may be made of the textbooks.

Consequently, it is submitted that the New York Court of Appeals correctly found that no aid to religion was provided and that the nonpreferential provision of textbooks to all children, enrolled in grades 7 through 12, regardless of the nature of the school attended, entailed only aid to the children and did not constitute an establishment of religion in contravention of the First Amendment to the United States Constitution.

POINT II

The provision of textbooks to all children enrolled in specified school grades constitutes a public welfare program of the State and providing access to that program to all children regardless of their religious faith, or lack of it, does not constitute an establishment of religion.

A.

Despite the baseless allegations of the appellants that the primary intent of New York's Textbook Loan Law was to aid sectarian schools, if one thing is at all clear from the statute itself and the record in this case is that *the sole intent of the statute is to aid all children to secure a better education* and that that intent constitutes a public purpose.

The power of the states to legislate and expend tax-raised funds for public purposes was amply expounded in this Court's opinion in the *Everson* case, *supra,* wherein it was stated (330 U. S., pp. 6-7):

> "It is true that this Court has, in rare instances, struck down state statutes on the ground that the purpose for which tax-raised funds were to be expended was not a public one. * * * But the Court has also pointed out that this far-reaching authority must be exercised with the most extreme caution. * * * Otherwise, a state's power to legislate for the public welfare might be seriously curtailed, a power which is a primary reason for the existence of states. Changing local conditions create new local problems which may lead a state's people and its local authorities to believe that laws authorizing new types of public services are necessary to promote the general well-being of the people."

The right of the states to legislate for the general welfare of their citizens having been recognized, must the

states then single out and exclude from the benefits of that legislation persons, otherwise eligible, whose adherence to a particular religious belief would be made easier because of an incidental effect of the program upon their religious practices? To state the question is to reject an affirmative response. In *Everson,* this Court stated the proposition in these words (330 U. S., p. 16):

> "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenents and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief."

Consequently, if improvement of secular educational opportunities for all children constitutes public welfare legislation, children cannot be excluded from the benefits of that legislation solely because they exercise a constitutional right to attend sectarian schools.

In 1947, this Court held that legislation intended to facilitate the opportunity of children to get a secular education did serve a public purpose (*Everson* v. *Board of Education, supra,* 330 U. S., p. 7). Is it any less a public purpose today?

In the case of *Matter of Weberman*[17] the New York Courts found the State's power over minors sufficient to sustain a law requiring all children, regardless of the school attended and regardless of the religious beliefs of the children or their parents, to be instructed "in at least the eleven common school branches (specified by statute) of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training and the history of New York State". Thus, the State has power to regulate reasonably the teaching of secular subjects in all schools, public and nonpublic. If a State may regulate the secular courses taught in all schools, may it not also provide the textbooks used by children in studying these courses?

In *Brown v. Board of Education* (347 U. S. 483 [1954]), the overwhelming significance of equality of educational opportunity was recognized by this Court when it stated (p. 493):

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to

[17] 198 Misc. 1055, 100 N. Y. S. 2d 60 (Sup. Ct., Kings County, 1950), affd. 278 App. Div. 656, 102 N. Y. S. 2d 418, affd. 302 N. Y. 855, app. dism. 342 U. S. 884.

provide it, is a right which must be made available to all on equal terms."

Both on the State and Federal level, the importance of education to the public welfare has been not only recognized but also emphasized as a matter of prime legislative concern.

President Johnson's State of the Union message to the Congress in 1965 proposed that, in accepting the challenge of the Great Society, the Nation begin with education, with "a program to insure every American child the fullest development of his mind and skills". In his message to the Congress on education, the President stated a national goal of full educational opportunity for every child in the land. As to that goal he stated:

> "We want this not only for his sake—but for the Nation's sake.
>
> "Nothing matters more to the future of our country; not our military preparedness, for armed might is worthless if we lack the brainpower to build a world of peace; not our productive economy, for we cannot sustain growth without trained manpower; not our democratic system of government, for freedom is fragile if citizens are ignorant."

In his special message to Congress preceding the introduction of the 1963 Federal aid to education bill, President Kennedy stated:

> "* * * from every point of view, education is of paramount concern to the national interest as well as to each individual. Today we need a new standard of excellence in education, matched by the fullest possible access to educational opportunities, enabling each citizen to develop his talents to the maximum possible extent."

Two years earlier, in 1961, also in a special message to the Congress concerning Federal aid to education, President Kennedy presented this vision to the people:

> "Our progress, as a nation, can be no swifter than our progress in education. Our requirements for world leadership, our hopes for economic growth, and the demands of citizenship itself * * * require the maximum development of every young American's capacity. The human mind is our fundamental resource."

In his Annual Message to the New York State Legislature in 1965, Governor Rockefeller observed on the subject of education:

> "New York State stands at the forefront of American education. It leads the Nation in the fullness and variety of opportunity it offers its youngsters for education of high quality and to the limit of their capacities. This decade of New York history already is destined to be marked as unique in its maximum effort to sustain and enlarge these opportunities without regard to race, color, creed or financial status.
>
> * * *
>
> "For today, as never before, the education of young men and young women determines their chance to make a maximum contribution to society."

In an address to the Livingston County Teachers Association on September 20, 1965, New York's Governor described "our most important responsibility" as "the responsibility of educating every young man and woman to the limit of his or her desire and capacity in order to assure equal opportunity for all to get ahead in this trying and competitive world."

Probably the most outstanding factor common to all the above-quoted statements is the emphasis upon universal educational opportunity for all children, and the omission

of direct concern with the school systems or buildings involved. There is no doubt, not only from the quoted policy statements but also from the decisions of this Court that education serves a public purpose and that legislation in the field of education is public welfare legislation.

B.

The next issue for consideration is whether textbook legislation, such as that involved in the instant case, also serves a public welfare need.

In his message on education, referred to above, President Johnson observed that "the cost of purchasing textbooks at increasing prices puts a major obstacle in the path of education—an obstacle that can and must be eliminated".

Testifying before the General Subcommittee on Education of the Committee on Education and Labor of the United States House of Representatives on January 22, 1965, Francis Keppel, commissioner of Education in the Department of Health, Education and Welfare, testified (Hearings, *op. cit.* p. 93):

> "When we turn to survey the needs of our schools for modern textbooks, we find that all too often our children must use textbooks which are out of date and grossly inadequate for this area of expanding educational horizons. It is a sad fact that 'modern history' books often have nothing to teach our children about events after World War I and that physics texts frequently deal with the state of our knowledge in the 1940's and 1950's—ignoring, for example, the atomic revolution.
>
> "For many families the purchase of a child's textbooks is a luxury they can ill afford. A 1964 study shows that one-fourth of the school systems in 128 of our largest cities do not provide free textbooks at the high school level. Nonpublic schools

> rarely provide free textbooks. A poor family with children in high school may be required to spend $15 to $20 or more per child for up-to-date textbooks—a prohibitive sum where money doesn't exist for many of the barest necessities of life. In 1961, parents spent over $90 million for textbooks—approximately 40 percent of that year's total expenditures for textbooks. Children in families unable to support this extra burden are often turned from the halls of the schools to the alleys of the slums."

That New York's Textbook Loan Law constitutes legitimate public welfare legislation, having a valid secular purpose, is made clearly apparent by application of the above-quoted factors. First, considering public schools alone in the 12 school districts or more which did not provide any free textbooks, the children and their parents were relieved of a substantial economic burden by the mandate that all districts provide free textbooks. Since the majority of the districts were city school districts, where the problem of the educationally deprived child is greatest, the importance of the legislation in terms of educational opportunity is readily apparent. Secondly, even as to those districts which did provide free textbooks, the legislation had significant effect upon the updating of textbooks by providing for full State reimbursement of cost up to $15 per child and partial reimbursement of expenditures in excess of that amount. Lastly, as to children attending sectarian schools it gave them access to this public welfare program, relieved their parents of the financial burden of purchasing textbooks and helped the children involved to achieve greater opportunities for a secular education.

Recognizing the sectarian school as a significant unit in a universal education system, the State cannot divest itself of all connection with it. To do so would be to defeat its own purpose and to exclude from the benefits and from

the teachings fundamental in American education those children who do not attend the public schools. The State would be obliged to keep rigidly aloof and have no part in the operation of the sectarian school. Lest this be so, and that education in those schools be comparable to that received in public schools, there must be cooperation between the State and the sectarian schools. Every instance of cooperation is, to be sure, in a sense "aid" to the denominational school, but every such instance is not forbidden aid. The approach must be realistic. The proper and desirable activities of the State in the interest of the health and welfare of its children cannot be withheld from some of them because they attend a denominational school:

> "Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place, outside of public aid or support. * * * The separation of the public school system from religious denominational instruction is thus complete." (*People ex rel. Lewis* v. *Graves*, 245 N. Y. 195, 198-199 [1927].)

As education has grown in this country and as government has increased its activities in the interest of the health and welfare of its people and of its children, it has brought within the sphere of its aid and control the denominational as well as the public school.

Indeed, it is the expansion of the government's role in all areas of American life which compels a re-examination of church-state problems. This expansion is true of both the Federal and State Governments and their activities. Government is assuming constantly broader authority in its spending, tax, and regulatory powers to meet human needs. This means that government is encroaching on areas of social concern that were at one time the special responsibility of voluntaristic societies, particularly the

churches. The churches have historically conducted a variety of welfare and charitable activities and have engaged in educational enterprises at all levels. The assumption by government of an increased responsibility for educational and welfare needs, the inability of voluntaristic groups to meet these needs, and the growing financial burden on private institutions in maintaining their programs—all lead to problems of vital concern respecting the constitutionality and propriety of governmental assistance to schools and colleges and to hospitals and other welfare enterprises conducted under church auspices.

The significance of this welfare concept in the statute involved in the case at bar is apparent from the policy statement set forth in Chapter 320 and quoted by the concurring Justices in the Appellate Division (A 52-53):

> "The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other non-sectarian subjects. The Congress of the United States has reaffirmed the principle that the states and local communities retain primary responsibility for public education. It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense, and the general welfare of the state."

New York's legislative history also shows the incorporation of denominational schools within the State's ambit of educational concern:

For example, in the State of New York denominational schools are chartered by the Board of Regents (N. Y. Education Law, § 216). There is regular inspection by the Education Department of the nonpublic as well as the public school (N. Y. Const., Art. XI, § 3; N. Y. Education Law, § 305 [2]). The sectarian school is exempt from taxation (N. Y. Const., Art. XVI, § 1; N. Y. Real Property Tax Law, § 420). Attendance at a nonpublic school complies with the compulsory education law (N. Y. Education Law, § 3204) and satisfies the requirements for part-time attendance (N. Y. Education Law, § 4601) Terms of attendance in the nonpublic as well as the public school are prescribed (N. Y. Education Law, §§ 3204-3205), and certain curriculum requirements are imposed (N. Y. Education Law, §§ 3204, 801, 803, 806-808, 3002).

These are all aspects of the inclusion of the sectarian school in the universal education program. Some of them have the semblance of aid to the sectarian school; others of discipline of the school. If the divorce of the State from the sectarian school must be total, the State could not extend the provisions of any of these statutes to it. The principle of separation of church and state must ever remain inviolate in these United States; and it has so remained although the several states, under the police power, have legislated in a variety of respects for the welfare of children in the denominational as well as in the public schools. The provision of textbooks to pupils in both public and nonpublic schools does not spell danger to that principle, although philosophically theoretical arguments may be spun showing a remote and incidental benefit to the sectarian school which the child receiving the books attends.

C.

In applying the principle of separation of church and state to particular fact situations, the first test is whether or not government is directing its program to an appropriate secular end. This was made clear in the Sunday-closing cases where this Court found statutes valid which had as their ultimate aim the promotion of the appropriate secular objective of having a single day of rest during the week (*McGowan* v. *Maryland, supra; Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U. S. 582 [1961]; *Gallagher* v. *Crown Kosher Super Market, Inc.*, 366 U. S. 619 [1961]; *Braunfeld* v. *Brown*, 366 U. S. 599 [1961]). In the Court's opinion in *McGowan*, it was stated as to the Sunday-closing laws (366 U. S., p. 445):

> "The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State."

Applying these principles to the instant case, it is apparent that the secular end expressed in New York's Textbook Loan Law, of adequate educational opportunities for all children, without any intent of promoting or aiding sectarian education, meets the test of separation of church and state.

Religion, under the decisions of this Court, may not be used as a basis for classification in order to aid or hinder religious activity. The effect of the Establishment and

Free Exercise Clauses is to neutralize the religious factor as a basis of government classification. This was stated in this Court's opinion in *Everson* (330 U. S., p. 18):

> "That [First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

This neutrality position was reaffirmed in *Abington School District* v. *Schempp; supra,* wherein Mr. Justice CLARK, writing for the Court, stated (374 U. S. 214-215, 222):

> "Almost a hundred years ago in *Minor* v. *Board of Education of Cincinnati,* Judge Alphonso Taft, father of the revered Chief Justice, in an unpublished opinion stated the ideal of our people as to religious freedom as one of
>
> 'absolute equality before the law, of all religious opinions and sects * * *.
>
> * * *
>
> 'The government is neutral, and, while protecting all, it prefers none, and it *disparages* none.'
>
> * * * *
>
> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

The Free Exercise Clause, then, does not state an independent substantive concept of religious liberty but makes clear that there shall be no discrimination on religious

grounds in the enjoyment of legal rights and privileges. In turn, the Establishment Clause precludes aid to religion as such but not aid extended to religious activities incidental to a broader classification which rests on a legitimate secular basis.

Mr. Justice BRENNAN, concurring in the *Schempp* case, offered another test by which legislation could be measured against the Establishment Clause (374 U. S. at pp. 294-295):

> "What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice."

Under any of these tests, the lending of secular textbooks to all children, aimed at achieving a secular result of adequate educational opportunities for all children, does not constitute a violation of the First Amendment.

New York in the Textbook Loan Law has remained neutral as to religion, it does not discriminate on the basis of a child's religion or lack of it, it merely provides him access to free secular textbooks without regard to the nature of the school he attends.[18]

While it may be *argued* that New York's Legislature could have achieved its secular purpose by providing textbooks only to pupils in public schools, that Legislature

---

[18] Except that the school attended must comply with the compulsory education law, which means merely that it must be a full time day school teaching the areas of learning required by law, and does not relate to how well it is administered, as appellants and *amici* contend (N. Y. Education Law, § 3204).

apparently concluded that it could not accomplish its secular purpose without including children in sectarian schools, if only because of the substantial percentage of the total pupil population represented by these children.

In 1961, Charles Silver, the former President of the Board of Education of the City of New York, during Congressional Hearings on the then proposed Federal Aid to Education Act, testified that nonpublic schools in New York City enrolled at that time approximately 450,000 children in all grades—or one out of every three children in schools in New York City.

Statewide, for the school year ending June 30, 1967, there were enrolled in public schools in grades 7 through 12 in New York 1,383,703 children and in non-public schools 337,929. Consequently, approximately 20 percent of the children in this State in those grades attend nonpublic schools. Whether any program aimed at achieving equality of educational opportunity for all children could legitimately exclude 20 percent of the State's children could be seriously challenged.

Since the provision of secular textbooks constitutes valid public welfare legislation and New York's statute makes those textbooks available to all children without regard to their religious faith or lack of it, the fact that New York does not specifically exclude children attending sectarian schools does not make the statute unconstitutional or constitute an establishment of religion. New York may constitutionally include children attending sectarian schools in a nonpreferential welfare program and has done so in the Textbook Loan Law.

POINT III

Expenditure of general tax money for textbooks to be provided to all children regardless of the school they attend does not violate the "free exercise" clause of the First Amendment solely because some children receiving the books attend sectarian schools.

Appellants contend on this appeal that to the extent tax money is used to purchase and loan textbooks to pupils attending sectarian schools, it violates the Free Exercise Clause of the First Amendment on the ground that taxpayers who disagree with the religious beliefs taught in any or all of those schools are compelled to contribute to "the propagation of opinion" with which they disagree.

Initially it must be remembered that the moneys expended are for *secular* texts. The books loaned must be those already designated for use in public schools or approved by a public school board. The opinion of counsel of the Education Department of the State of New York, printed as an appendix to appellants' brief, specifically directs the public school districts that they are not to provide denominational editions or those carrying the "imprimatur" or "nihil obstat" of any religious authority. Thus, the texts cannot be such as contribute to the propagation of any religious belief.

Appellants also attempt to compare the provision of secular textbooks with a tax to support a religion, as was attempted by Virginia in 1784 and which resulted in Madison's famous "Memorial and Remonstrance against Religious Assessments" and Jefferson's "Bill for the Establishment of Religious Freedom". Yet once again the moneys used to purchase secular textbooks are not spent in the support or propagation of any religion.

The tax funds involved in the Textbook Loan Law are not spent for the benefit of any religious institution or doctrine. They are spent to provide secular textbooks to students attending both public and nonpublic schools. They relieve the sectarian schools of no obligation which the institutions had formerly assumed since on the record in this case, the parents purchased the books, not the sectarian schools. No public money is being spent for the payment of religious costs or for religious purposes and the argument advanced by the appellants must fall on this ground alone.

How far the appellants must reach to advance their argument under the Free Exercise Clause is clearly indicated by their attempt to equate the defeat of New York State's proposed new constitution in 1967 with the church-state issue (Applts.' Brief, p. 35). It is true that the proposed repeal of the so-called Blaine Amendment[19] created considerable public debate, but there were many other issues involved in the defeat, such as the submission of the proposed constitution to the voters in a "take it or leave it" package without giving them separate votes on important questions, the proposed lowering of the voting age, court reorganization, free college tuition, State assumption of all welfare costs and control over local welfare agencies, the denial to the people of the right to vote on the contracting of State indebtedness, and many other provisions, all of which contributed to the defeat of the constitution. Of particular significance on this issue is the fact that 40 percent of the State's voters are estimated to be Catholic, without regard to adherents of other religious denominations which have denominational schools, and yet less than ⅓ of the State's voters voted for the constitution. Obvious-

[19] N. Y. Const. Art. XI, § 3 prohibits the use of public money or property directly or indirectly in aid of sectarian educational institutions.

ly the religious issue did not control the outcome of the voting. The projection of that issue into this case is a mere mirage—a thing of no substance or reality.

Conversely, however, it may well be argued that the denial to a child of access to a general public program, solely because he attends a sectarian school, violates his rights to the free exercise of *his* religion.

Compulsory education is one of the basic concepts of the American way of life. It is encouraged and supported by the people. The free American, however, also cherishes his right to have a voice in the education of his child, and to that end, to choose the type of school which his child shall attend. Many prefer the denominational or private school instead of the public school. Indeed, this Court has held that a state may not enact legislation compelling attendance of children at a public school (*Pierce* v. *Society of Sisters,* 268 U. S. 510 [1925]). That case involved a statute which made attendance at public schools within the State compulsory. This Court held the law invalid as an unreasonable interference with the right of parents to control the education of their children and warned (pp. 534-535):

> "As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

The sectarian school is thus recognized as legally equivalent to the public school system so far as compulsory attendance is concerned. Children of this country attend sectarian schools. It has been said that the same spirit of democracy which nurtured public education in this country has inspired the development of the sectarian school. The elimination of any religious instruction from the public schools in this democracy has caused parents, who prefer that their children receive instruction of this nature, to maintain the sectarian schools.

Not only do children have a right to attend sectarian schools, they also have a right not to be penalized for attending such schools. Denial of access to general public welfare programs solely because the children attend sectarian schools can be construed as a penalty imposed upon them because of their religion and consequently a violation of their right to the free exercise of their religion. This contention is clearly supported by this Court's holding in *Sherbert* v. *Verner* (374 U. S. 398 [1963]), decided at the same term as the *Schempp* case, *supra*.

In that case, the State of South Carolina denied unemployment benefits to a claimant solely on the ground that she refused to take employment which required her to work on Saturday because her religious beliefs, as a Seventh Day Adventist, required her to refrain from work on that day. Holding that the denial of benefits was unconstitutional as to the appellant therein, this Court expounded upon the interrelation between the Free Exercise Clause and public welfare legislation (pp. 403-404):

> "We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does. In a sense the consequences of such a dis-

qualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. For '[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.' *Braunfeld* v. *Brown, supra,* at 607. Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

"Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that the liberities of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."

Here, too, a child, whose religious beliefs impel him to attend a denominational school, would, if because of that attendance he would be excluded from the benefits of New York's Textbook Loan Law, be compelled to choose between following the precepts of his religion and forfeiting benefits on one hand or abandoning one of the precepts of his religion to secure the benefits. This would constitute an impairment of his right to the free exercise of his religion.

In the light of the Sherbert decision above quoted, we submit that the denial of a child's access to a nonpreferential public program providing secular textbooks to all children solely because that child attends a sectarian school would be unconstitutional and that New York cannot constitutionally deprive that child of the right to receive those textbooks and has not done so.

CONCLUSION

The judgment appealed from should be affirmed.

Dated: March 27, 1968.

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Appellee,
James E. Allen, Jr.
The Capitol
Albany, N. Y. 12224

RUTH KESSLER TOCH
Solicitor General

JEAN M. COON
Assistant Attorney General

of Counsel